IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF TANGA)

AT TANGA

CRIMINAL APPEAL No. 1 OF 2021

(Arising from the District Court of Muheza at Muheza in Criminal Case No. 125 of 2019)

MASHAKA ROBISON @ CHELA @ KONYA ---------- APPELLANT

Versus

THE REPUBLIC ---------- RESPONDENT

JUDGMENT

09.08.2021 & 13.08.2021
F.H. Mtulya, J.:

Mr. Mashaka Robison @ Chela @ Konya, Juma Manata @ Ibrahim @ Chinga and Juma Amiri @ Mbokozi @ Mangi were arrested and jointly prosecuted for armed robbery contrary to section 287A of the **Penal Code** [Cap. 16 R.E. 2019] (the Code) before the **District Court of Muheza at Muheza** (the district court) in **Criminal Case No. 125 of 2019** (the case). After full hearing of the case, the district court convicted Mr. Mashaka Robison @ Chela @ Konya (the Appellant) of the offence as charged and acquitted Juma Manata @ Ibrahim @ Chinga and Juma Amiri @ Mbokozi @ Mangi, as the prosecution did not prove the case beyond reasonable doubt against the two accused persons.

The decision dissatisfied the Appellant hence approached this court and registered a total of six (6) grounds of appeal complaining of several matters. However, when the appeal was scheduled for hearing in this court through visual court, the Appellant, a lay person without any legal representation, briefly submitted on the first two grounds of appeal, namely: first, that the trial magistrate erred in law and fact by relying on visual identification without description of the Appellant and second, improper conduct of indentification parade. In his brief submission, the Appellant submitted that the prosecution failed to correctly identify him as per requirement of the law in visual identification during night hours and second, three persons who were called to identify him in police station, did not correctly identify him as per requirement of the law regulating identification parade.

The submission of the Appellant was received well by learned State Attorney, Ms. Elizabeth Muhangwa, who supported the appeal in all registered grounds of appeal. According to Ms. Elizabeth, there are two (2) defects in the proceedings which vitiate the proceedings and judgment of the district court in the case, namely: improper identification of the Appellant; and uncertainty of the value of the stolen items. With the first issue, Ms. Muhangwa submitted that the Appellant was not well identified by PW1 & PW2 as they testified

before the district court that they identified the Appellant from solar light, but did not give descriptions of the person identified as per decision in **Waziri Amani v. Republic** [1980] TLR 250. On the second matter, Ms. Muhangwa submitted that there are contradictions on things stolen and value of money involved. According to Ms. Muhangwa, PW1, PW2 and PW4 sharply differed in their evidences as PW1 & PW2 testified the value involved in the offence as Tanzanian Shillings Five Hundered Thousand Only (500,000/=) whereas PW4 testified that it was Tanzanian Shillings One Hundred Twenty Five Thousand Only (125,000/=). To Ms. Muhangwa's submission, contradictions of this kind cannot be invited in cases like the present one as it goes to the root of the matter. To bolster her argument, Ms. Muhangwa cited the authority in **Stany Loidi v. Director of Public Prosecutions**, Criminal Appeal No. 466 of 2017.

I have had an opportunity to read the record of this appeal. The record shows that on 18th November 2019, the Appellant, Juma Manata @ Ibrahim @ Chinga and Juma Amiri @ Mbokozi @ Mangi were arrested and jointly charged for armed robbery contrary to section 287A of the Code before the district court in the case. The properties robbed are reflected in plenty at the charge sheet valued in

total Tanzanian Shillings One Million Nine Hundred Sixty Four Eight Hundred Only (1, 964, 800/= Ths.).

During trial, as per proceedings of the case started on 14th November 2019, and completed on 20th November 2020, the prosecution summoned a total of six witnesses to establish its case against the accused persons, namely: police officer ASP Jonas Sila, Mtuwa Hassani, Zaina Hassani, Noel Charles, police G. 4346 DC Anthony, and Dr. Nziku. However, only four registered their presence during the hearing of the case, namely: Mr. Mtuwa Hassani (PW1), Zaina Hassani (PW2) Mr. Noel Charles (PW3) and police G. 4346 DC Anthony (PW4).

Record shows further that there were two eye witnesses, PW1 and PW2. At page 10 of the proceedings of the case, PW1 stated that he identified the accused persons from a solar light produced in 450 Watts. However, PW1 testified that he saw the accused for the first time and no detailed descriptions of the accused persons were recorded in the district court. Similarly, PW2 testified, as depicted at page 12 of the case proceedings, to have identified the Appellant from solar power. However, PW2 could not provide details of the

Appellant and testified further that she could not be able to identify other attackers.

The district court on its part, convicted the Appellant and sentenced him to thirty (30) years imprisonment. The reasoning of the district court is found at pages 8 & 9 of the judgment that:

> *The victim and his wife who were present on the day of the incident spoke clearly that they did not identify the second and third accused persons...PW1 and PW2 clearly identified the first accused person, who has been close to them and seen to be leader of his fellow...and solar power with enough light to enable them to identify him properly...*

The practice of this court in our jurisdiction has been that before basing a conviction solely on evidence of visual identification, such evidence must remove all possibilities of mistaken identity and the court must be fully satisfied that the evidence is watertight. The practice is supported by the precedents in **Waziri Amani v. Republic** (supra), **R. v Eria Sebwato** [1960] E.A. 174 and **Shiku Salehe v. Republic** [1987] TLR 193). It is from this practice, where the Justices of Appeal in the precedent of **Waziri Amani v Republic** (supra) at page 251-252 stated that:

...evidence of visual identification, as Courts of in East Africa and England have warned in a number of cases, is of the weakest kind and most unreliable. It follows, therefore that no court should act on evidence of visual identification unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence before it is absolutely watertight.

In determining the criteria, the Court of Appeal categorically stated that:

Although no hard and fast rules can be laid down as to the manner a trial judge should determine questions of identity, it seems clear to us that he could not be said to have properly resolved the issue unless there is shown on the record a careful and considered analysis of all the surrounding circumstances of the crime being tried. We would, for example, expect, to find in the record questions such as the following posed and resolved by him: the time the witness had the accused under observation; the distance at which he observed him; the conditions in which such observation occurred for

instance, whether it was day or night-time whether there was good or poor light at the scene; and further whether the witness know or had seen the accused before or not.

It is unfortunate that some of these directives are not displayed on record and the learned Resident Magistrate remained silent on the directives. This court and other lower courts in judicial hierarchy are required to abide with the directives of the Court of Appeal. Failure to abide with the directives renders the decision a nullity and will be suppressed by superior courts.

On the other hand, with regard to stolen items registered in the Charge Sheet, the prosecution side showed contradictory evidences. During the proceedings of the case, PW1, PW2 and police investigator PW4 differed sharply on the stolen items. According to the testimonies of PW1 & PW2 as per case proceedings at pages 10 & 12, the accused persons robbed Tanzanian Shillings Five Hundred Twenty Thousand Only (520,000/=) and several other items whereas at page 18, PW4 testified that the amount of money involved and taken by the accused was Tanzanian Shillings One Hundred Twenty Five Thousand Only (125, 000/=) and divided the money equally in four

(4) persons and that the remaining balance was taken by the Appellant.

However, the district court in the case remained silent on this discrepancy on crucial piece of evidence which goes to the root of the matter on what was robbed by the accused persons to establish the offence of armed robbery. The directives from our superior court in judicial hierarchy, the Court of Appeal, in the precedents of **Stany Loidi v. Director of Public Prosecutions** (supra), **Masota Jumanne v. Republic**, Criminal Appeal No. 137 of 2016 and **Vumi Liapenda Mushi v. Republic**, Criminal Appeal No. 327 of 2016 is to the effect that:

> *...the prosecution evidence was riddled with contradictions on what was actually stolen from PW1. Such circumstances do not only imply that there was a variance between the particulars in the charge and the evidence as submitted by the learned state attorney. This is also goes to the weight of evidence which is not in support of the charge.*

There is another important fault in the case, which renders the whole case a nullity for want of fair proceedings as per law in the

Criminal Procedure Act. Record shows that cautioned statement recorded to the third accused person (PE1), which was tendered by PW4 in the case, as depicted at page 19 of the case proceedings, shows that PE1 was read and considered by the district court before it was admitted as per requirement of the law in the precedent in **Stany Loidi v. Director of Public Prosecutions** (supra). At page 14 the Court of Appeal categorically stated that:

> *It is noted that the statement were read out before the trial court although they were subsequently rejected, a practice unfortunately common in trials before subordinates courts. Whenever it is intended to introduce any document in evidence, it should first be cleared for admission, and be actually admitted, before it can be read out. Reading out documents before they are admitted in evidence is wrong and prejudicial. If the document is ultimately excluded, as happened in this case, it is difficult for the court to be seen not to have been influenced by the same.*

On my part, I agree with Ms. Muhangwa that the evidence in exhibit PE1 was read before its admission hence it was not properly

admitted. This was wrong and prejudiced the Appellant and since it was wrongly admitted, I hereby expunge it from the record.

In view of the foregoing, I agree with the Appellant and learned State Attorney Ms. Muhangwa that the case was not proved beyond reasonable doubt. I therefore allow the appeal, quash the conviction, set aside the sentence meted out against the Appellant and order for his immediate release from prison custody unless held for other lawful cause.

Order accordingly.

F.H. Mtulya

Judge

13.08.2021

This judgment is delivered in Chamber under the seal of this court in the presence of the Appellant, Mr. Mashaka Robison @ Chela @ Konya through visual court and in the presence of learned State Attorney, Ms. Elizabeth Muhangwa.

F.H. Mtulya

Judge

13.08.2021